86-1142

Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

RICHARD MOODY,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, IN ITS DECISION BELOW HOLDING THAT VENUE IN A MARIJUANA IMPORTATION CASE COULD PROPERLY BE LAID IN ANY DISTRICT INTO WHICH ANY PORTION OF THE IMPORTED MARIJUANA ULTIMATELY WAS BROUGHT, HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, PARTICULARLY WHERE THE CIRCUIT COURT DECISION CONFLICTS WITH PRINCIPLES EXPRESSED BY THIS COURT IN ITS PRIOR DECISIONS?

LIST OF INTERESTED PERSONS

The only persons having an interest in the outcome of this case are the Petitioner, his family and the United States of America.

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FOR THE THIRD CIRCUIT

Petitioner, RICHARD MOODY, respectfully prays that a writ of certiorari issue to review the judgment, opinion, and order on rehearing of the United States Court of Appeals for the Third Circuit, entered in Case No. 86-3283 on October 16, 1986, and November 10, 1986, which affirmed the judgment of the United States District Court for the Western District of Pennsylvania.

OPINION BELOW

The United States Court of Appeals for the Third Circuit announced its opinion and judgment affirming the Petitioner's convictions for conspiracy to import marijuana, in violation of 21 U.S.C. §963, conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. §846, importation of marijuana, in violation of 21 U.S.C. §952(a), and possession of marijuana with intent to distribute, in violation of 21 U.S.C. §841(a)(1), in United States v. Sandini, et al., 803 F.2d 123 (3d Cir. 1986). That opinion is reproduced in the Appendix. (A.1-23). A petition for panel rehearing and for rehearing in banc was denied by the Court on November 10, 1986. This order is also reproduced in the Appendix. (A.24-25).

JURISDICTION

Jurisdiction is invoked under 28 U.S.C. §1254(1). This petition is filed within the authorized time period following the Third Circuit's order on rehearing. Sup.Ct.R. 20.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. III, §2, cl. 3:

> The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein

the crimes shall have been committed, which district shall have been previously ascertained by law....

18 U.S.C. §3237(a)(1982):

(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails or transportation in interstate or foreign commerce is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district through, or into which such commerce or mail matter moves.

Pub. L. 98-473, Title II, §1204(a), 98 Stat. 2152 (effective October 12, 1984):

Sec. 1204 (a) The second paragraph of subsection (a) of Section 3237 of Title 18, United States Code is amended to read as follows:

"Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

STATEMENT OF THE CASE

On June 27, 1985, in the United States District Court for the Western District of Pennsylvania, RICHARD MOODY was charged in four counts of a 23-count indictment with conspiracy to import marijuana, in violation of 21 U.S.C. §963, conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. §846, importation of marijuana, in violation of 21 U.S.C. §952, and possession of marijuana with intent to distribute, in violation of 21 U.S.C. §841. The same indictment charged a number of defendants, including Hilmer Sandini, one of MOODY's coconspirators, in a large-scale cocaine trafficking conspiracy. Prior to trial, MOODY filed a motion for severance and relief from prejudicial joinder, arguing that the marijuana conspiracy was entirely

separate from the cocaine conspiracy, and that joinder could not be justified by the mere fact that MOODY's coconspirator Sandini was alleged to be a participant in both conspiracies. MOODY also argued that joinder was prejudicial as to him because the introduction of evidence concerning the cocaine conspiracy in his trial would deprive him of a fair opportunity to have the jury determine his guilt or innocence on the marijuana charges. The trial court agreed and entered an order for severance. MOODY's trial commenced on December 18, 1985, and the jury returned verdicts of guilty on all four counts on December 20, 1985. On April 24, 1986, MOODY was sentenced to concurrent terms of imprisonment of 360 days on each count, to be followed by a special parole term of two years. He was also fined on all four counts for a total of $16,000. (A.2-4).

According to the testimony, MOODY was a member of a marijuana trafficking conspiracy led by indicted coconspirator Ed Mills. MOODY supplied the airplane, a Cesna 401, used in the group's importation of marijuana into the United States, and provided partial financing for the purchase of the marijuana. The Mills group started business in 1981. They planned to purchase marijuana in Jamaica, fly the marijuana from there to the Bahamas and ship it from there by boat to Florida. This trip was attempted for the first time in 1982. MOODY's plane was used to move the contraband from Jamaica to the Bahamas. The load was then lost because Mills failed to arrange for boats to carry the marijuana from the Bahamas to Florida. Shortly thereafter, a second trip was planned, for which MOODY supplied $15,000 for the marijuana purchase as well as his air-

plane. This mission also failed. MOODY again agreed to supply $15,000 and the use of his airplane for a third importation effort. (A.4-5).

The third trip from Jamaica, using an airplane which was rented from Hilmer Sandini, was a success. Eight hundred pounds of marijuana was brought into South Florida where it was stored at a business called Roy's Welding, which was owned by Rex Foster, a coconspirator.

The individual who was chosen to broker the marijuana was a man named Dan Richitelli. The day after the marijuana arrived in South Florida, Richitelli came to Roy's welding with an individual named Ronald Todd, who purchased $50,000 worth of the marijuana and placed it in the trunk of his car. Todd testified as a government witness at trial, stating that he took this marijuana to the Western District of Pennsylvania, where he sold a portion of it. (A.7-8).

At the close of the government's case, MOODY, through his counsel, moved for a judgment of acquittal on Counts 2 and 4 of the indictment (the conspiracy to import and substantive importation counts) based upon the prosecution's failure to prove venue in the Western District of Pennsylvania. This motion was denied, on its merits, by the trial judge.

MOODY appealed his convictions and sentences to the United States Court of Appeals for the Third Circuit, which had jurisdiction over the appeal pursuant to 28 U.S.C. §1291 and Rule 4, F.R.A.P. On appeal, MOODY argued that the trial court erred in denying his motion for judgment of acquittal on those two counts. The basis of MOODY's argument was the line of cases holding that venue in importation cases is properly laid in the district of the imported substance's

"final destination." Based upon the decisions in these cases, as well as the constitutional provisions involved, MOODY argued that venue could not, constitutionally, be placed in any district into which the substance ultimately was brought. Rather, MOODY contended, the offenses of conspiracy to import marijuana and importation of marijuana were completed when the marijuana reached the district which the conspirators intended to be the final point of destination for the contraband and the fact that the contraband may subsequently have been distributed by others into other districts did not support a prosecution brought in one of those districts. The circuit court, however, ruled as follows:

> 14. Appellant Moody relies on five cases in which narcotics were destined for one destination, seized at a port of entry, i.e., California or

Florida, and then sent on to the destination originally intended to be the final destination by the defendant. See United States v. Netz, 758 F.2d 1308 (8th Cir. 1985); United States v. Lowry, 675 F.2d 593 (4th Cir. 1982); United States v. Gray, 626 F.2d 494 (5th Cir. 1980), cert. denied, 449 U.S. 1091 (1981); United States v. Godwin, 546 F.2d 145 (5th Cir. 1977); United States v. Jackson, 482 F.2d 1167 (10th Cir. 1973), cert. denied, 414 U.S. 1159 (1974). In each of these cases, the appellate court concluded that the proper venue for the prosecution was the final destination of the contraband rather than the port at which the narcotics entered the country. Appellant Moody argues that the critical point in these cases is that the courts held that proper venue was in the district that the defendant intended to be the final point of destination for the contraband. Although the facts of the cases support this contention, there is no language in any of the opinions to support it. These courts were concerned not with the well-laid plans of defendants, but with the artificiality of assigning venue to the district of the port of entry. They were anxious to reject an earlier precedent from the Eastern District of Virginia asserting that the port of

entry was the proper venue per se in marijuana importation cases. See United States v. Lember, 319 F.Supp. 249 (E.D. Va. 1970). Thus, these courts held not that the proper venue for a violation of 21 U.S.C. §952(a) is the destination intended by the defendant, but that

> importation of a controlled substance in violation of 21 U.S.C. §952(a) is a "continuous crime" that is not complete until the controlled substance reaches its final destination point, and that venue is proper in any district along the way.

Gray, 626 F.2d at 498 (citing Jackson, 482 F.2d at 1178); accord, Godwin, 546 F.2d at 147-47.

15. It is unrealistic to assume that the "final destination" of all Florida-based drug smugglers is Florida. Florida is merely the conduit through which many controlled substances imported into this country must pass before reaching destinations outside of that state. Appellant argues that it would be unjust and irrational to lay venue in any jurisdiction where a small amount of contraband imported into Florida happened to find

> its way. That is not what happened in this case. This case involves the transportation of $50,000 worth of marijuana purchased almost immediately after the drug's arrival in this country by an individual contracted by the coconspirators' own specially-selected marijuana broker. Although the Western District of Pennsylvania may not have been the final destination intended by the appellant, it was nevertheless the final destination of a considerable amount of the marijuana he conspired to import into this country. To adopt appellant Moody's argument and hold that Florida was the "final destination" for this contraband would be to reinstate Lember's irrational port of entry rule rejected by the very authorities appellant cites. Venue was properly laid in the Western District of Pennsylvania.

It is this ruling by the Court of Appeals which the Petitioner is asking this court to review. A petition for rehearing and for rehearing in banc was denied by the circuit court on November 10, 1986. However, the circuit court, recognizing the importance of this ques-

tion, granted a stay of mandate to January 9, 1987, so as to allow Petitioner the opportunity to petition this court for entry of a writ of certiorari.

REASONS FOR GRANTING THE WRIT

THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, IN ITS DECISION BELOW HOLDING THAT VENUE IN A MARIJUANA IMPORTATION CASE COULD PROPERLY BE LAID IN ANY DISTRICT INTO WHICH ANY PORTION OF THE IMPORTED MARIJUANA ULTIMATELY WAS BROUGHT, HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, PARTICULARLY WHERE THE CIRCUIT COURT DECISION CONFLICTS WITH PRINCIPLES EXPRESSED BY THIS COURT IN ITS PRIOR DECISIONS.

The question of where an accused shall stand trial was a matter of such importance to those who wrote the Constitution and the Bill of Rights that they dealt with it in two separate provisions. Article III, §2 of the Constitution requires that "the trial of all crimes ... shall be held in the state where said crimes shall have been committed...." U.S. Const. art. III, §2, cl. 3. In addition, the Sixth Amendment

to the Constitution provides that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law...." U.S. Const. amend. VI. Thus, this Court has, more than once, stated that questions of venue in criminal cases are more than matters of mere procedure. They raise deep issues of public policy in the light of which legislation must be construed. United States v. Johnson, 323 U.S. 273, 275 (1944); Travis v. United States, 364 U.S. 631, 634 (1961).

As pointed out by the Third Circuit in its decision, federal venue in narcotics importation cases is controlled by 18 U.S.C. §3237(a). This statute, as amended by Pub. L. 98-473, Title II,

§1204(a), 98 Stat. 2152 (effective October 12, 1984), classifies importation as a continuing offense and provides that it "may be inquired of and prosecuted in any district from, through, or into which such ... imported object ... moves." The Third Circuit held that "under the plain meaning of the statutory language, venue is proper in the Western District of Pennsylvania because the 'imported object,' i.e., the marijuana, 'move[d]' into the Western District of Pennsylvania." Petitioner submits, however, that such an over literal reading of the statute is inconsistent with its legislative history, with this Court's prior precedents and with the line of circuit court cases which underlies the 1984 amendment to the Act.[1/]

[1/] Petitioner agrees that the question (fn.cont.)

The doctrine of continuing offense was explained by this Court in its decision in United States v. Johnson, 323 U.S. 273 (1944). In an opinion authored by Justice Frankfurter, this Court held:

> [B]y utilizing the doctrine of a continuing offense, Congress may, to be sure, provide that the locality of a crime shall extend over the whole area through which force propelled by an offender operates. Thus, an illegal use of the mails or of other instruments of commerce may subject the user to prosecution in the district where he sent the goods, or in the district of their arrival, or in any intervening district. Plainly enough, such leeway not only opens the door to needless hardship to an accused by prosecution remote from home

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of whether the 1984 amendment applies to crimes committed prior to its effective date is inconsequential, inasmuch as the amendment was enacted not to alter but to clarify prior law in this area. Additionally, this Court has held that the ex post facto clause of the Constitution does not preclude a change of the place of trial of an alleged offense after its commission. Cook v. United States, 138 U.S. 157 (1891).

> and from appropriate facilities for defense. It also leads to the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution.
>
> These are matters that touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests. These are important factors in any consideration of the effective enforcement of the criminal law. They have been adverted to, from time to time, by eminent judges; and Congress has not been unmindful of them. Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it.

323 U.S. at 275-76.

These principles are violated by the circuit court's decision in the case

at bar. As shown by the legislative history to the 1984 amendment of 21 U.S.C. §952(a), Congress's intent was not to encourage the prosecution of importation offenses in any district in which the substance imported ultimately was brought, up to and including the district in which it finally was consumed. Rather, Congress intended to permit importation crimes to be prosecuted not only in the district in which the substance enters the United States, but also in the district of its destination. The amendment specifically was designed to overcome the decision in United States v. Lember, 319 F.Supp. 249 (E.D. Va. 1970), which held that venue in importation cases is limited to the district of entry and to adopt the reasoning of a line of circuit court cases holding that venue is properly laid in the district of final destina-

tion. The intent of Congress is expressed in the legislative history of the Act:

> In addition, this Part amends 18 U.S.C. §3237 to add offenses involving the importation of a person or an object into the United States and thereby to classify such offenses as continuing offenses for which venue is appropriate in any district in which the imported object or person moves. This is designed to overcome the decision in United States v. Lember, which limited venue in importation cases to the district of entry rather than of final destination. Such a construction is unjustified and would create difficulties since the witnesses are usually located in the place of destination. Moreover, the district of destination rather than first entry normally has the greater interest in vindicating the offense.

United States Code Congressional and Administrative News. SR No. 98-225, 98th Cong., 2d Sess., reprinted in [1984] U.S. Code Cong. & Ad. News 3538.

The 1984 amendment to 18 U.S.C. §3237(a) thus is consistent with the

line of circuit court cases holding that venue in an importation case is properly laid in the district which is the contraband's "final destination." See, e.g., United States v. Netz, 758 F.2d 1308 (8th Cir. 1985); United States v. Lowry, 675 F.2d 593 (4th Cir. 1982); United States v. Gray, 626 F.2d 494 (5th Cir. 1980), cert. denied, 449 U.S. 1091 (1981); United States v. Godwin, 546 F.2d 145 (5th Cir. 1977); United States v. Jackson, 482 F.2d 1167 (10th Cir. 1973), cert. denied, 414 U.S. 1159 (1974). In each of these cases, the appellate court concluded that the proper venue for the prosecution was the final destination of the contraband rather than the port at which the narcotics entered the country. What is significant is that in each of these circuit court decisions, the facts supported the conclusion that the district

of "final destination" was the district to which the importers intended to bring the contraband from the outset. Thus, the facts of each of these cases support Petitioner's contention that those courts held that proper venue was in the district that the defendant intended to be the final point of destination for the contraband.

The facts of the case at bar present a far different situation. In this case the evidence, taken in the light most favorable to the government, showed that the Petitioner and his co-conspirators made arrangements to import 800 pounds of marijuana into the Southern District of Florida. Following two unsuccessful attempts at importation, the marijuana was successfully brought into Florida and stored at a South Florida business location owned by one of the Petitioner's coconspirators.

It was only after the marijuana had been brought into the Southern District of Florida that Petitioner's coconspirators contacted another individual, a so-called "marijuana broker," who was not a participant in the importation conspiracy. It was this "marijuana broker" who, in turn, procured a buyer for $50,000 worth of the marijuana. This buyer also was not a member of the importation conspiracy and was not a principal in the importation. Yet because this buyer, on his own initiative, transported the portion of the marijuana which he purchased into the Western District of Pennsylvania, the circuit court held that venue was proper in the Western District of Pennsylvania under the "final destination" doctrine.

Petitioner suggests to this Court that the venue question raised in this case does raise deep issues of public

policy in the light of which 18 U.S.C. §3237(a) and the so-called "final destination" doctrine must be construed. The liberal construction given to that act by the Third Circuit ignores this Court's warning "that venue provisions in acts of Congress should not be so freely construed as to give the government the choice of "a tribunal favorable" to it. Travis v. United States, 364 U.S. 631, 634 (1961); United States v. Johnson, 323 U.S. 273, 275 (1944).

The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place. United States v. Cores, 356 U.S. 405, 407 (1958). Provided its language permits, the act in question should be given that construction which will respect such considerations. Id. Thus, if an enactment

of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go to the direction of constitutional policy even though not commanded by it. United States v. Johnson, 323 U.S. 273, 276 (1944). These decisions support Petitioner's contention that it is a reasonable and not a strained construction to read the statute to mean that the crime of importation is complete when the contraband reaches the district intended by the defendant to be the final point of destination for the contraband.

The expansive reading given to 18 U.S.C. §3237(a) by the Circuit Court in the case at bar represents a grave erosion of a basic constitutional right provided to a criminally accused in not just one, but in two separate provisions

of our Constitution. The questions raised herein, revolving around the classification of importation of contraband as a "continuing offense" and the applicability of the "final destination" doctrine are issues which are likely to reoccur with frequency and, unless resolved by this Court, are likely to result in uncertainty and further litigation with respect to the proper jurisdiction for prosecution of such offenses. Cf. Borchardt v. United States, __ U.S. __, 105 S.Ct. 341, 342 (1984)(Brennan, J. dissenting). This Court is urgently requested to issue its writ of certiorari and to take this opportunity to resolve these important federal issues once and for all.

CONCLUSION

For the above-stated reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-3283

THE UNITED STATES

v.

HILMER BURDETTE SANDINI, ERNEST G. ROCKWELL, GEORGE WHITE KOST, RONALD PAUL URBAN, CAROL ANN HINEMAN SANDINI, SANDRA JEAN SANDINI, MICHAEL FRAWLEY, DAVID THOMPSON, GEORGE STRICKLER, SHERMAN JOHN GLUNT, SANTOS RUIZ, ROBERT KOTULA, EUGENE ANTHONY GESUALE, ROBERT MAKER, VINCENT CIRAOLO, RICHARD MOODY, EDWARD MILLS, REX FOSTER, KENNETH HILL, HARRY JESSUP, ROSE JESSUP

Richard Moody, Appellant

On Appeal from the United States District Court for the Western District of Pennsylvania (Pittsburgh)
D.C. Civil No. 85-150

Submitted Under Third Circuit Rule 12(6)
September 30, 1986

Before: WEIS, MANSMANN, and HUNTER
Circuit Judges

Opinion filed October 16, 1986

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OPINION OF THE COURT

HUNGER, Circuit Judge:

1. On June 27, 1985, in the United States District Court for the Western District of Pennsylvania, appellant Richard Moody was charged in four counts of a 23 count indictment with conspiracy to import marijuana in violation of 21 U.S.C. §963, conspiracy to possess marijuana with intent to distribute in violation of 21 U.S.C. §846, importation of marijuana in violation of 21 U.S.C. §952(a), and possession of marijuana with intent to distribute in violation of 21 U.S.C. §841(a)(1). The same

indictment charged a number of defendants, including Hilmer Sandini, one of Moody's coconspirators, in a large-scale cocaine trafficking conspiracy. Prior to trial, Moody filed a Motion for Severance and Relief from Prejudicial Joinder, arguing that the marijuana conspiracy was entirely separate from the cocaine conspiracy, and that joinder could not be justified by the mere fact that Moody's coconspirator Sandini was alleged to be a participant in both conspiracis. Moody also argued that joinder was prejudicial as to him because the introduction of evidence concerning the cocaine conspiracy at his trial would deprive him of a fair opportunity to have the jury determine his guilt or innocence on the marijuana charges. The trial court agreed, and on August 27, 1985, entered an Order of Severance. Moody's trial commenced on

December 18, 1985, and the jury returned verdicts of guilty on all four counts on December 20, 1985. On April 24, 1986, Moody was sentenced to concurrent terms of imprisonment of 360 days on each count, to be followed by a special parole term of two years. He was also fined on all four counts a total of $16,000. This appeal, in which Moody challenges (a) the admission of allegedly prejudicial evidence at trial and (b) improper venue, followed.

2. According to the testimony, Moody was a member of a marijuana trafficking conspiracy led by indicted co-conspirator Ed Mills. Moody supplied the airplane, a Cessna 401, used in the group's importation of marijuana into the United States, and provided partial financing for the purchase of the marijuana. The Mills group started business in 1981. They planned to purchase mari-

juana in Jamaica, fly the marijuana from there to the Bahamas, and ship it from there by boat to Florida. This trip was attempted for the first time in 1982. Moody's plane was used to move the contraband from Jamaica to the Bahamas. The load was then lost because Mills failed to arrange for boats to carry the drugs from the Bahamas to Florida. Shortly thereafter, a second trip was planned, for which Moody supplied $15,000 for the drug purchase as well as his airplane. This mission also failed. Moody again agreed to supply $15,000 and the use of this airplane for a third importation effort, and this time his partners promised him $60,000 for the use of the plane and 1/3 of the balance of all profits to compensate him for his previous investments.

3. Around the same time that the Mills group was planning its third mari-

juana run from Jamacia, the members of the conspiracy met with Hilmer Sandini and his associate Dan Mitrione at the Clock Restaurant in Florida. This meeting's participants discussed the marijuana importation scheme; a proposal by Sandini that members of the Mills group become involved in his cocaine importation scheme; the possible use by Sandini of Moody's Cessna 401; and the possible use by Mills of Sandini's Cessna 411. Moody, though present may not have actively participated in any of these conversations. After several more meetings with the Mills group, Sandini learned that neither Moody nor any of his coconspirators was interested in the cocaine venture. Sandini was also rebuffed in his offer to broker the marijuana haul once it arrived in Florida.

4. Sandini finally became involved in the marijuana importation scheme when the Mills group used his plane instead of Moody's to make the third run from Jamaica. Sandini rented the plane to the Mills group for $30,000, demanding that $15,000 be paid when the plane took off from Boca Raton Airpot, and $15,000 when it returned. Moody brought the first $15,000, in cash, to the Boca Raton Airport and delivered it to one of his coconspirators, who later passed it on to Sandini.

5. The third trip from Jamaica was a success. Sandini was fully paid for the use of his airplane upon the marijuana's arrival into the United States. The Mills group immediately sold $50,000 worth of the marijuana to Ronald Todd, whom they had met through Dan Richitelli, the individual chosen to broker the marijuana. Todd brought the

marijuana he had purchased into the Western District of Pennsylvania.

6. Moody testified on his own behalf at trial. Moody testified that, in 1982, he decided that he wanted to sell his airplane. In March or April 1982, he entered into a lease-purchase agreement with Ed Mills. Moody only received one payment on this lease-purchase agreement, which consisted of $15,000 in cash. Because Moody did not believe that this much cash could be kept safely, he returned it to Mills several days later, at the Boca Raton Airport. Moody also testified that his meetings with Sandini concerned Sandini's interest in purchasing various pieces of Moody's property, including his Cessna 401. No sale ever came of any of these discussions. At none of the meetings between Moody and Sandini, insists Moody, were drugs ever discussed.

7. Appellant Moody's first point of appeal is based on Federal Rules of Evidence 404(b) and 403. Moody argues that the admission at trial of evidence regarding the meetings between the Mills group and Hilmer Sandini was irrelevant and prejudicial, because the profferred testimony concerned a cocaine conspiracy in which Moody was not involved. The prosecution's purpose in introducing this testimony, Moody argues, was the "prejudicial and improper [one] of showing that Moody had been associating with some bad people." Brief for Appellant at 16. Moody argues that no evidence of these meetings should have been admitted at trial, or, short of that, that any reference to the cocaine conspiracy should have been excluded. The government argued successfully at trial that the evidence of the Sandini meetings was essential to its case because, without

it, "[n]othing would make any sense." Appendix at 245. On appeal, the government argues that the Sandini meetings were needed to show that, contrary to Moody's testimony, Moody was fully aware of how his airplane was being used by Mills.

8. Before reaching the merits of Moody's claims under Rules 404(b) and 403, we must determine whether appellant is barred from raising these claims by Federal Rule of Evidence 103(a)(1). Rule 103(a)(1) restricts appellate review of evidentiary errors to those in which the complaining party has "stat[ed] the specific ground of objection, if the specific ground was not apparent from the context ...." Although the degree of specificity required by the Rule is not clear, it has been established that general objections, such as the characterization of

the offending evidence as irrelevant, will not suffice. See, e.g., United States v. Blackshear, 568 F.2d 1120, 1121 (5th Cir. 1978).

9. Appellant Moody's principal ground for objecting to the admission of the evidence of the Sandini meetings is that these meetings constituted "other acts" that were relied upon by the prosecution to suggest that Moody had a propensity for drug-related crime or a generally bad character as demonstrated by his association with Sandini. Such tactics are prohibited by Rule 404(b), which provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to show that [the defendant] acted in conformity therewith." Appellant Moody also argues that the testimony about the Sandini meetings should have been excluded under Rule 403, which directs the trial judge to exclude any

relevant evidence that is "substantially outweighed by the danger of unfair prejudice." Appellant did not properly preserve either of these grounds of objection for appeal. At no point during the colloquy between defense counsel, the United States Attorney and the trial judge did defense counsel specifically invoke either Rule 404(b)[1/] or Rule 403, as required by Rule 103(a)(1) and our precedents. See Carter v. Hewitt, 617 F.2d 961, 966 n.4 (3d Cir. 1980); United States v. Long, 574 F.2d 761, 766 (3d Cir.), cert. denied, 439 U.S. 985 (1978). Nor was defense counsel's reliance on either of these Rules "apparent from the context." See United States v. Gibbs, 739 F.2d

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1/ The United States Attorney, however, did remark that "[i]f nothing else, it would certainly be 404 anyway because they are discussing at the same time multiple acts." Appendix at 246.

838, 849 (3d Cir. 1984), cert. denied, U.S.__ (1985). The substance of the colloquy was not of such a character to put the trial judge on notice that an objection based on Rule 404(b) or Rule 403 was at issue. Instead, defense counsel simply repeated three times that the information was "irrelevant." The trial judge's determination that the evidence was admissible will not be disturbed. See Kane v. Ford Motor Co., 450 F.2d 315, 316 (3d Cir. 1971). Therefore, appellant Moody's appeal must fail as far as it relies on Rule 404(b) and Rule 403 because those grounds for objection were not properly preserved for appellate review.

10. Appellant Moody's second point of appeal is that the trial court erred in denying his motion for judgment of acquittal on Counts II and IV of the indictment (the conspiracy to import and

substantive importation counts) based on the prosecution's failure to prove venue in the Western District of Pennsylvania. The Constitution of the United States restricts the government's choice of venue in criminal cases. In Article III, the Constitution requires that "the trial of all crimes ... shall be held in the State where said crimes shall have been committed ...." U.S. Const. art. III, §2, cl. 3. The Sixth Amendment further provides that "in all criminal prosecutions, the accused shall enjoy the right to a a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed ...." U.S. Const. amend. VI. Appellant Moody claims that the alleged crime of importation ended in Florida, and that the prosecution of his case in the Western District of Pennsylvania thus violated the U.S. Constitution.

11. The United States contends that Moody has waived his right to object to venue in the Western District of Pennsylvania. The government correctly asserts that objections to venue are waived if not raised in a timely manner, i.e., "at least prior to the close of the government's case ... and perhaps before the trial begins." United States v. Polin, 323 F.2d 549, 577 (3d Cir. 1963). However, all circuits reaching this question have mitigated the harshness of this rule by holding that venue objections are waived only "when the indictment ... clearly reveals [the venue] defect but the defendant fails to object." United States v. Price, 447 F.2d 23, 27 (2d Cir.), cert. denied, 404 U.S. 912 (1971). Consequently, where there is a proper allegation of venue in the indictment, but the government fails to prove that allegation at trial, a

challenge to venue in a motion for acquittal is timely. See 2 C. Wright, Federal Practice and Procedure: Criminal §306. p. 600, n. 9 and cases cited therein (2d ed. 1982 & Supp. 1986). Until the government rests its case, the defendant has no notice that a facially proper allegation of venue is in fact defective, and thus there can be no waiver until the close of the government's case. United States v. Black Cloud, 590 F.2d 270, 272 (8th Cir. 1979); United States v. Bohle, 445 F.2d 54, 58 (7th Cir. 1971). Moody has not waived his right to object to venue, because venue in the Western District of Pennsylvania was properly alleged in Counts II and IV of the indictment, which charged Moody with conspiracy to import and importation of marijuana into the Western District of Pennsylvanina. See United States v. Netz, 758 F.2d

1308, 1311-12 (8th Cir. 1985)(no waiver of objection to venue in the Western District of Missouri where indictment charged defendant with importation of cocaine into the Western District of Missouri).

12. Federal venue in narcotics importation cases is controlled by 18 U.S.C. §3237(a), which provides that

> **§3237. Offenses begun in one district and completed in another**
>
> (a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

18 U.S.C. §3237(a)(1982)(emphasis added). Under the plain meaning of the statutory language, venue is proper in the Western District of Pennsylvania because the "imported object," i.e., the marijuana, "move[d]" into the Western District of Pennsylvania.

13. Appellant Moody argues that 18 U.S.C. §3237(a) is inapplicable to him because the statute was not enacted until after the commission of the crime. The government responds that the statute was enacted not to alter but to clarify prior law in this area. The resolution of this debate is inconsequential. Appellant Moody asks this court to apply the teachings of a line of cases holding that venue is properly laid in the district of the marijuana's "final destination." See, e.g., United States v. Godwin, 546 F.2d 145 (5th Cir. 1977); United States v. Jackson, 482 F.2d 1167

(10th Cir. 1973), cert. denied, 414 U.S. 1159 (1974). It is this same line of cases that the government believes underlies the amendment of 18 U.S.C. §3237(a). Therefore, we will apply the teachings of the final destination cases to this appeal.

14. Appellant Moody relies on five cases in which narcotics were destined for one destination, seized at a port of entry, i.e., California or Florida, and then sent on to the destination originally intended to be the final destination by the defendant. See United States v. Netz, 758 F.2d 1308 (8th Cir. 1985); United States v. Lowry, 675 F.2d 593 (4th Cir. 1982); United States v. Gray, 626 F.2d 494 (5th Cir. 1980), cert. denied, 449 U.S. 1091 (1981); United States v. Godwin, 546 F.2d 145 (5th Cir. 1977); United States v. Jackson, 482 F.2d 1167 (10th Cir.

1973), cert. denied, 414 U.S. 1159 (1974). In each of these cases, the appellate court conluded that the proper venue for the prosecution was the final destination of the contraband rather than the port at which the narcotics entered the country. Appellant Moody argues that the critical point in these cases is that the courts held that proper venue was in the district that the defendant intended to be the final point of destination for the contraband. Although the facts of the cases support this contention, there is no language in any of the opinions to support it. These courts were concerned not with the well-laid plans of defendants, but with the artificiality of assigning venue to the district of the port of entry. They were anxious to reject an earlier precedent from the Eastern District of Virginia asserting that the port of

entry was the proper venue per se in marijuana importation cases. See United States v. Lember, 319 F.Supp. 249 (E.D. Va. 1970). Thus, these courts held not that the proper venue for a violation of 21 U.S.C. §952(a) is the destination intended by the defendant, but that

> importation of a controlled substance in violation of 21 U.S.C. §952(a) is a "continuous crime" that is not complete until the controlled substance reaches its final destination point, and that venue is proper in any district along the way.

Gray, 626 F.2d at 498 (citing Jackson, 482 F.2d at 1178); accord, Godwin, 546 F.2d at 147-47.

15. It is unrealistic to assume that the "final destination" of all Florida-based drug smugglers is Florida. Florida is merely the conduit through which many controlled substances imported into this country must pass before reaching destinations outside of that state. Appellant argues that it would

be unjust and irrational to lay venue in any jurisdiction where a small amount of contraband imported into Florida happened to find its way. That is not what happened in this case. This case involves the transportation of $50,000 worth of marijuana purchased almost immediately after the drug's arrival in this country by an individual contracted by coconspirators' own specially-selected marijuana broker. Although the Western District of Pennsylvania may not have been the final destination intended by the appellant, it was nevertheless the final destination of a considerable amount of the marijuana he conspired to import into this country. To adopt appellant Moody's argument and hold that Florida was the "final destination" for this contraband would be to reinstate Lember's irrational port of entry rule rejected by the very authorities appel-

lant cites. Venue was properly laid in the Western District of Pennsylvania.

16. The appellant's conviction will be affirmed.

A True Copy:
Teste:

Clerk of the United States
Court of Appeals for
the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-3283

UNITED STATES OF AMERICA

v.

RICHARD MOODY,

Appellant

(D.C. Crim. No. 85-150)

SUR PETITION FOR REHEARING

Present: ALDISERT, Chief Judge, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, Circuit Judges.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit

judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/S/
Circuit Judge

DATED: NOV 10 1986